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89-1748

In The

Supreme Court of the United States

October Term, 1989

OREGON NATURAL RESOURCES COUNCIL,

Petitioner,

v.

DAVID MOHLA, Supervisor, Mt. Hood National Forest; JAMES TORRENCE, Regional Forester, Pacific Northwest Region; UNITED STATES FOREST SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in determining that § 314 of Pub.L. No. 100-446, 102 Stat. 1825 (1988), which prohibits "challenges to any existing [Forest Service] plan on the sole basis that the plan in its entirety is outdated," but preserves challenges to "any and all particular activities to be carried out under existing plans," bars judicial review of this challenge to a single timber sale on the Mt. Hood National Forest.

PARTIES BELOW

The following is a complete list of the parties named in the proceedings below:

Oregon Natural Resources Council, as plaintiff-appellant below.

David Mohla, in his official capacity as Supervisor, Mt. Hood National Forest; James Torrence, in his official capacity as Regional Forester, Pacific Northwest Region; United States Forest Service, an agency of the United States; and Avison Timber Company, an Oregon corporation, as defendants-appellees below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Oregon Natural Resources Council, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled proceeding on February 7, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears as *Oregon Natural Resources Council v. Mohla*, 895 F.2d 627 (9th Cir. 1990). This opinion is reproduced in the appendix hereto. Appendix A at A-1. The opinion and order of the United States District Court for the District of Oregon, *Oregon Natural Resources Council v. Mohla*, No. 88-1377-MA (D. Or. May 25, 1989), are also reproduced in the appendix. Appendix B at A-10 (Opinion) and Appendix C at A-24 (Order).

JURISDICTION

Judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 7, 1990, denying judicial review of petitioner's claim for relief under the Administrative Procedure Act (APA). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), which allows petitions for writ of certiorari after judgment of a Court of Appeals in any civil case.

STATUTE INVOLVED

This case concerns section 314 of the Department of the Interior and Related Agencies Appropriations Act for the fiscal year 1989, Pub. L. No. 100-446, 102 Stat. 1825 (1988).[1] Section 314 provides:

> The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. § 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: *Provided, however,* That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further,* That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

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[1] Section 314 was reenacted without change for fiscal year 1990 as section 312 of H.R. 2788 and signed by the President on October 23, 1989, and is now found in Pub.L. No. 101-121.

STATEMENT OF THE CASE

Petitioner seeks review of a court of appeals decision that eliminates a fundamental aspect of civil liberty: the right of citizens to enforce federal environmental laws in court. The Ninth Circuit's ruling exempts countless day-to-day Forest Service decisions from the need to comply with federal environmental laws – with grave implications for the nation's public lands and the courts' role in assuring that federal agencies comply with the law.

This case originated as a challenge by plaintiff/petitioner Oregon Natural Resources Council (ONRC) to the decision of the Supervisor of the Mt. Hood National Forest (Forest Service or USFS) to sell the "Badger Resell" timber sale – a single timber sale – in violation of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* The sale consists entirely of old-growth forest, an irreplaceable and unique natural forest type rapidly disappearing from the Pacific Northwest. Important forest ecological research published in the last decade has established that old-growth forests are highly specialized, diverse, and dynamic ecosystems. This research repudiates the previous paradigm, which viewed old-growth forests as stagnant biological deserts.[2] *See*

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[2] Specifically, recent research has disclosed that "there are major contrasts between old-growth and managed, young-growth stands in structure, species, and patterns of material and energy flows." *See* Appendix B at A-15. Old-growth forests include trees at all stages of the life cycle, which together form an uneven tree canopy. These features provide optimal foraging and nesting habitat for a tremendous variety of plant and animal species. Among those species is the northern spotted

(Continued on following page)

Appendix B at A-15. This recent research has helped establish that the loss of old-growth forests is irreparable. Once logged, no amount of human effort or ingenuity can restore such forests to their native condition.

The Forest Service proposed to log the Badger Resell without discussing or analyzing any of the significant new findings about the old-growth forest environment. Indeed, the Forest Service based its decision on an Environmental Assessment Report (EAR) prepared in 1977 – an EAR, that is, that substantially predates the new information.

The Badger Resell EAR "tiers" to two programmatic EISs. One EIS addresses the Salmon River Unit and Roaring River Unit Land Use Plan (issued in 1974), the other the Mt. Hood Forest Timber Management Plan (TMP) (issued in 1977).[3] *See* Appendix B at A-12-13. Like the Badger Resell EAR, these EISs predate the new old-growth research. These decade-old EISs completely fail to discuss the old-growth forest environment of the forest, or the consequences of logging it.

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owl, which the U.S. Fish & Wildlife Service has proposed for listing under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* *See* 54 Fed.Reg. 26666 (June 23, 1989) (announcing proposed rule listing northern spotted owl as threatened species).

[3] Tiering is that process by which an agency prepares general planning and environmental analysis for large areas, followed by site-specific decisions based on further site-specific environmental analysis. CEQ regulations encourage tiering, so as to "avoid repetitive discussions . . . and to focus on the actual issues ripe for decision at each level of environmental review." 40 C.F.R. § 1502.20.

The Forest Service issued its Notice of Decision to sell the Badger Resell in March 1988. ONRC appealed that decision administratively. After the Forest Service denied its appeal, ONRC brought this suit. *See* Appendix D at A-25.

ONRC's complaint alleges that the Service's failure to address significant new information about the ecological significance of old-growth systems violates NEPA's mandate that an agency accurately describe the environment affected by a proposed action, 40 C.F.R. § 1502.15, explain the likely effects of the action, 40 C.F.R. § 1502.16, and revise old environmental documents in light of significant new information. *See Marsh v. Oregon Natural Resources Council*, 109 S.Ct. 1851, 1857-58 (1989); 40 C.F.R. § 1502.9(c)(ii). However, neither the district court nor the Court of Appeals reached the merits of ONRC's claim. Instead, the district court ruled, and the Court of Appeals affirmed, that § 314 of the Interior and Related Agencies Appropriations Act of 1989, Pub. L. No. 100-446, 102 Stat. 1825 (1988)[4](§ 314) bars review of the claim. *See* Appendices B and C at A-10 and A-24 (district court opinion and order, respectively); Appendix A at A-1 (Ninth Circuit opinion).

In a four-page opinion, the Ninth Circuit acknowledged that, "on its face," ONRC's challenge is *not* among those whose review Congress expressly barred in § 314. Appendix A at A-8. Moreover, the appeals court found § 314 to "suffer from some want of clarity" and that the

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[4] Section 314 was reenacted without change as § 312 of H.R. 2788 and signed by the President on Oct. 23, 1989, and is now found in Pub. L. No. 101-121.

legislative history did not "cure[]" its obscurity. Nevertheless, construing the limitation on review "broadly" (even while recognizing that such limitations *should* be construed "narrowly"), the appeals court held this suit barred by § 314.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S DECISION THAT SECTION 314 STRIPS THE COURTS OF JURISDICTION TO HEAR ONRC'S CLAIM CONFLICTS WITH THIS COURT'S ESTABLISHED TEACHINGS REGARDING LIMITATIONS ON JUDICIAL REVIEW

The Ninth Circuit's ruling that § 314 bars review of this case disregards this Court's settled teachings protecting the right to judicial review of agency action absent clear statutory preclusion. *See, e.g., National Labor Relations Board v. United Food and Commercial Workers Union*, 484 U.S. 112, 131 (1987) ("*NLRB*"); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1966). Deviating from established principles, the Ninth Circuit has *broadly* construed a limitation on judicial review and ignored altogether language which expressly preserves judicial review in cases just like this one. *See infra*, Sections A.1, 2. Moreover, again ignoring this Court's clear direction, the Ninth Circuit interpreted section 314 to broadly limit review of Forest Service decisions – a result specifically rejected by Congress. *See infra*, Section A.3.

By its ruling, the Ninth Circuit has immunized from judicial scrutiny a broad range of Forest Service decisions

concerning the federal lands. The court's ruling enables the Forest Service to ignore federal environmental laws in its day-to-day management of the national forests – a result never intended by Congress.

A. The Ninth Circuit's Decision Ignores The Fundamental Principle, Reiterated Time And Again By This Court, That Judicial Review Is Presumptively Available.

This Court has consistently affirmed that " 'the right of every individual to claim the protection of the laws' " – the right to judicial review – is of the "' very essence of civil liberty.' " *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting *Marbury v. Madison*, 1 Cranch 137, 163, 5 U.S. 137, 163, 2 L.Ed. 60 (1803)). As this Court observed in *Bowen*, committees of both Houses of Congress "have endorsed this view."[5] *Bowen*, 476 U.S. at 670.

While Congress can "make exceptions to the historic practice whereby courts review agency action," *Bowen*,

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[5] The Court quoted extensively from the legislative history to the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. The Senate Committee on the Judiciary remarked, for example:

> "Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board." S.Rep. No. 752, 79th Cong. 1st Sess., 26 (1945).

Bowen, 476 U.S. at 671.

476 U.S. at 672-73, any such "statutory preclusion of judicial review must be demonstrated clearly and convincingly." *NLRB*, 484 U.S. at 131. Where there is no express statutory language precluding review, then "[o]nly upon a showing of 'clear and convincing' evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories*, 387 U.S. at 141. This high showing is required to overcome the presumption favoring judicial review because the right of review is part of the fundamental constitutional "regime of separate and divided powers." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. at 670-71.

The Ninth Circuit ignored these clear rulings – and important principles – to find that section 314 deprives the federal courts of jurisdiction to hear ONRC's challenge to a single timber sale. Indeed, the court disregarded these fundamental precepts at every turn. The court found § 314 to preclude review even while acknowledging that the language of § 314 is "extraordinary" and that the provision "suffers from some want of clarity," that its legislative history does not "cure[]" its ambiguity, and that the decision requires a "broad[]" construction of § 314. *See* Appendix A at A-8-9. The appeals court's ruling thus openly flouts this Court's consistent teachings on the availability of judicial review.

1. The Court Of Appeals Ignored The Plain Language Of Section 314, Which Expressly Authorizes This Suit.

Section 314 addresses in three places the reviewability of Forest Service land management decisions

made pending the agency's completion of land and resource management plans pursuant to section 6(c) of the National Forest Management Act (NFMA), 16 U.S.C. § 1604(c).[6] First, § 314 provides that "Nothing shall limit judicial review of particular activities on these lands." Second, the provision's sole limitation on judicial review states, "there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated." Finally, § 314 reiterates that "any and all particular activities to be carried out under existing plans may nevertheless be challenged." Thus, the provision *twice* expressly preserves the right to challenge "particular activities," while limiting judicial review *only* in a narrow category of cases.

Individual timber sales are "particular activities," as the legislative history to the first enactment of section 314 in its current form makes clear. The conference committee report specifically explains:

> existing plans may not be challenged solely on the basis that the plans are outdated or that there is new information, unless the claim includes information as to substantive concerns related to the new information. *Any particular activities, such as individual timber sales, may continue to be challenged as always.*

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[6] The NFMA, passed in 1976, directs the Forest Service to prepare land management plans for the national forests, incorporating the standards and guidelines of the Act. The NFMA sets September 30, 1985 as the goal for completion of the plans. Section 6(c), 16 U.S.C. § 1604(c). The Mt. Hood National Forest, on which the Badger Resell lies, has not yet released its Forest Plan and final EIS.

Conference Report No. 498, 100th Cong., 1st Sess. at 925 (emphasis added).

Nothing in § 314 limits the *grounds* for challenging particular activities. Nothing in § 314 limits NEPA's applicability to individual timber sale decisions. Nothing in § 314 licenses the Forest Service to offer a timber sale without understanding the environmental consequences of doing so.

ONRC's claim is based on the Forest Service's flawed and illegal decision to sell a single timber sale, the Badger Resell. *See* Appendix D at A-26. Indeed, the Court of Appeals acknowledged as much. It correctly stated the issue in the case as "whether section 314 . . . bars a challenge to a Forest Service timber sale which raises environmental concerns in the context of the individual sale." *See* Appendix A at A-4. Applying this Court's dictates on the availability of judicial review, the Appeals Court should have ended its inquiry here, and found ONRC's claim reviewable. Instead, the court *ignored* the express savings language of § 314, *ignored* the undisputed fact that in this case ONRC challenges just one timber sale, and *ignored* the strong presumption favoring the availability of judicial review.

In short, the Ninth Circuit's opinion so blatantly disregards this Court's established teachings on the availability of judicial review that certiorari should be granted to correct the error.

2. The Court Of Appeals Improperly Construed § 314's Sole Restriction On Judicial Review Broadly To Hold That ONRC's Claim Is Barred.

The Ninth Circuit based its conclusion that § 314 bars this challenge to a single timber sale on what the court

itself termed a "broad[]" construction of the provision. *See* Appendix A at A-8. Yet, just two paragraphs earlier, the court correctly observed that limitations on judicial review are to be construed *narrowly*. *See id.* at A-7. Indeed, the same panel correctly applied that rule one year earlier in its first decision involving § 314. *See Portland Audubon Society v. Hodel*, 866 F.2d 302, 305 (9th Cir.) (quoting *Love v. Thomas*, 858 F.2d 1347 (9th Cir. 1987)), *cert. denied*, 109 S.Ct. 3229 (1989).

The Ninth Circuit characterized ONRC's claim as "generic," and asserted that it brought "into question decisions made in the Forest Service TMP [timber management plan]." *See* Appendix A at A-8. Thus, the court stated, if ONRC prevailed in *this* suit, it could challenge other particular timber sales on the Mt. Hood National Forest – "the entire Mt. Hood National Forest Timber Management Plan. . . . Such challenges would amount to an attack on the entire plan as outdated. . . ." *See id.* at A-8-9.

The court's conclusion suffers from three basic defects, all of which reflect its patent disregard for this Court's repeated instruction that judicial review is available unless Congress *clearly* precludes it. First, the decision assumes – incorrectly – that the TMP "decides" to log the old-growth forests of the Mt. Hood National Forest, including those of the Badger Resell, and thus that this challenge to the Badger Resell, which tiers to the TMP, amounts to a challenge to the TMP itself. *See* Appendix A at A-8. Like any programmatic plan, however, the TMP is a policy statement; it merely provides general planning direction for the Mt. Hood Forest and sets a

maximum cut level. The TMP does not *mandate* a particular sale level, nor does it *mandate* that particular areas be logged.[7] The TMP leaves for subsequent decisionmakers – who will have the benefit of more particularized information – such matters as whether, when, and where to offer individual timber sales. As the TMP EIS explains, the plan "will be responsive to future changes in land allocation and policy." Appendix F at A-48. [TMP EIS at ii.] In fact, nothing in the TMP forbids subsequent decisionmakers from deciding, sale-by-sale and on the basis of site-specific analysis (such as was *not* done for the Badger Resell), that no trees should be cut at all. *See City*

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[7] The cut level developed in the TMP is called the "potential yield." Appendix E at A-39. [TMP at 10] This is "the *maximum* amount of timber which *may* be cut from the national forest lands within the unit by years or other periods." 36 C.F.R. § 221.3(a)(5) (emphasis added). It is not, in other words, a mandatory cut level. The TMP itself states that the Plan's potential yield is the

> maximum sustained harvest *possible* under a specified management intensity level recognizing reductions for the constraints of key resources other than timber.

Appendix E at A-45. [TMP at 62] (emphasis added). The TMP makes clear that the plan's sale volume targets are "tentative" only, *id.* at A-40 [TMP at 52], and are not to preclude future discretion by the agency in site-specific decisions:

> These allocations are *subject to frequent adjustment as additional site specific information becomes available* and as further resource and economic study is completed and decisions are reached.

Id. (emphasis added.)

of Tenakee Springs v. Block, 778 F.2d 1402, 1406 (9th Cir. 1985) (programmatic EIS does not mandate particular uses, "in part because the 'no action' alternative still exists").

Section 314's second savings clause specifically acknowledges that site-specific decisions will be made pursuant to "existing plans," and protects the right to challenge *"any and all particular activities to be carried out under existing plans."* (Emphasis added.) Contrary to the Ninth Circuit's assertion, then, ONRC's challenge to the Badger Resell, like any challenge to an activity "to be carried out under [the TMP]," falls within the explicit savings language of section 314.

The Ninth Circuit's second fundamental error in sweeping this case within § 314's prohibition on judicial review lies in its assumption that if ONRC prevailed here, it could challenge, sale-by-sale, "the entire Mt. Hood National Forest Timber Management Plan." *See* Appendix A at A-8. The court's assumption finds no support in the record, and is in any event an improper basis for deciding this case.

First, it is simply not true that ONRC could bring the claim asserted here against *any* old-growth timber sale on the Mt. Hood National Forest. Other old-growth sales are challengeable *only if* the EARs for those sales suffer from the same defect as the Badger Resell EAR. There is *no* evidence in the record that *all* – or even *any* – other Mt. Hood National Forest timber sale EARs are equally flawed.

Second, *this* case concerns only one timber sale: the Badger Resell. The court's speculations about other timber sales and other lawsuits are irrelevant to the actual

controversy before the court. Indeed, the court's statement that future challenges to individual timber sales "*would* amount to an attack on the entire plan," *see* Appendix A at A-9 (emphasis added) underscores that the case the court addressed was not the one actually before it. The court's strained – and improper – effort to construe this challenge as falling within the narrow class of cases barred by § 314 demands correction.

Finally, even assuming ONRC could challenge other timber sales on the Mt. Hood National Forest for failing to address significant new information about old-growth ecosystems, § 314 specifically preserves challenges to "any *and all* particular activities to be carried out under" the Forest's existing TMP. Congress never intended to allow the Forest Service to insulate illegal conduct from judicial review simply by repeating it across the landscape.

Through a combination of wrong assumptions and misconceptions, the Ninth Circuit dramatically broadened § 314 to insulate particular Forest Service activities from judicial review. The court's action turns on their head this Court's established teachings, grounded in fundamental separation of powers principles, protecting citizens' right to review of agency action.

3. The Court Of Appeals Did Not Find In § 314's Legislative History That Congress "Clearly And Convincingly" Intended To Preclude Review Of This Suit.

This Court has made clear that the presumption favoring judicial review may be overcome by resort to

legislative history only where there is no express statutory language precluding review *and* where there is " 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)). The Ninth Circuit found neither condition present. Instead, it found that § 314 does *not* expressly preclude review, and that the legislative history is anything *but* clear. Yet the court held ONRC's claims barred.

Without elaborating, the Ninth Circuit concluded its decision in this case with the cryptic statement,

> While the statute suffers from some want of clarity which is not substantially cured by legislative history, it is plain that Congress did not intend such litigation.

Appendix A at A-9.

The fact is, what is "plain" from the legislative history is that Congress intended to *preserve* judicial review of challenges, like this one, to "particular activities." At worst, Congress' intent is unclear. In either case, this Court's prior consistent rulings should have preserved ONRC's right to proceed in court.

In any event, there is *no* support for the appeals court's unattributed conclusion that "Congress did not intend such litigation." Congress first passed § 314 in 1986 as a rider to the 1987 Interior and Related Agencies Appropriations Act.[8] The language ultimately adopted

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[8] Section 314 has been reenacted three times. The sole change in the subsequent versions was made in 1987,

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was worked out in conference between the House and Senate Appropriations committees, and differed markedly from that first introduced by Senator Mark Hatfield in the Senate Interior Appropriations Subcommittee. Senator Hatfield's original version contained neither of the savings clauses; it simply barred *all* judicial review of all Forest Service activities.[9]

The Senate rejected the original rider, however, as far too sweeping. Senator Max Baucus, who introduced the amendments which the full Senate ultimately adopted,[10] explained:

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expanding the provision's applicability to include Bureau of Land Management activities. Otherwise, Section 314 remains identical to the law first passed in 1986.

[9] Sen. Hatfield's bill provided:

> The Forest Service is encouraged to complete as expeditiously as possible development of land and resource management plans to meet the requirements of the National Forest Management Act (NFMA) of 1976. Under the provisions of section 6(c) of the NFMA (16 U.S.C. 1600), and notwithstanding any other provision of law, the Forest Service shall continue the management of units of the National Forest System under existing management plans pending the completion of land and resource management plans developed in accordance with the Act.

H.R. 5234, Rept. No. 99-397 (99th Cong., 2d Sess.), Aug. 13, 1986.

[10] The bill as passed by the Senate read:

> The Forest Service is to continue to complete as expeditiously as possible development of land and

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NEPA as well as the Endangered Species Act and other relevant environmental laws should apply here. They should not be overruled. They should not be exempt from the application of the forest lands by the Forest Service.

. . . .

. . . it is critically important that individual activities be fully challengeable.

. . . .

Under current law and established practice, the Forest Service is obligated to assure that its activities comply with NEPA. Road construction and *timber sale activities in particular have environmental consequences which are properly examined under auspices of NEPA* and Council on Environmental Quality and Forest Service regulations implementing that statute.

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resource management plans to meet the requirements of the National Forest Management Act of 1976 (NFMA). Notwithstanding the date in section 6(c) of the NFMA (16 USC 1600), the Forest Service may continue the management of units of the National Forest System under existing land and resource management plans pending the completion of plans developed in accordance with the Act. Nothing shall limit judicial review of activities on management units of the National Forest system, provided, however, such challenges are not intended to invalidate in its entirety any existing land and resource management plan developed under authorities other than section 6(c) of the NFMA.

See Cong. Rec., S12634 (Sept. 16, 1986).

Cong.Rec. S12635-12636 (Sept. 16, 1986) (emphasis added). Senator Baucus observed that the original language would actually have *undermined* the sponsor's original stated objective – to encourage the Forest Service to complete Forest Plans. The original version "would have created a huge incentive to continue using existing plans, since they would be exempt from all environmental laws." *Id.* at 12635.[11]

At conference committee, Congress amended the bill even further, giving it its present form (other than the reference to BLM activities, which was added the following year). In particular, the conference committee added the two savings clauses, which made clear that "any and all particular activities to be carried out under existing plans may . . . be challenged." Cong. Rec. H10679 (Oct. 15, 1986).

In short, perhaps *Senator Hatfield* "did not intend [this] litigation." *See* Appendix A at A-9. But the bill

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[11] The Senator also commented on the irregularity, if not impropriety, of legislating matters of forest management by appropriations bill riders. He noted that such matters are

> properly the province of the Senate Energy and Natural Resources Committee, and the Senate Environment and Public Works Committee. However, no proposal to amend NFMA in this manner has ever come before either committee. Nor has this proposal in any form been the subject of public hearings in either the authorizing committees or the appropriations committee.

Cong.Rec. S12636 (Sept. 16, 1986).

which eventually passed was a far cry from that originally introduced by Senator Hatfield in the Senate Interior Appropriations Subcommittee. Indeed, the legislative history reveals that Congress frankly repudiated the original bill's sweeping limitation on judicial review. The history confirms the apparent meaning of the statute's express language: that *Congress* intended *all* particular activities to remain subject to NEPA's requirements. The Ninth Circuit's refusal to acknowledge *Congress'* intent only compounds the court's other failures to heed this Court's clear instruction that judicial review is presumed available absent "clear and convincing evidence" to the contrary. *See, e.g., Bowen v. Michigan Academy of Family Physicians*, 476 U.S. at 671-2.

II

THIS COURT HAS FREQUENTLY GRANTED CERTIORARI TO REVIEW IMPORTANT QUESTIONS CONCERNING THE PUBLIC LANDS, AND SHOULD DO SO HERE

The Ninth Circuit's decision, by immunizing particular Forest Service decisions from judicial review, effectively guts NEPA as it applies to agency proposals for on-the-ground, site-specific activities pursuant to old plans.[12] The decision means that, as to agency actions on particular national forest lands, there is no assurance "that important effects will not be overlooked or underestimated only to be discovered after resources have been

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[12] The decision thus applies to activities on all those national forests which have not yet adopted forest plans pursuant to the NFMA, 16 U.S.C. § 1604.

committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835, 1845 (1989). Thus, the Ninth Circuit's opinion imperils the nation's last remaining large stands of ancient forests, and the many animal species which inhabit and depend on those forests.

This Court has repeatedly "granted certiorari because of the importance of [a] question to the management of the public lands." *Andrus v. Shell Oil Co.*, 446 U.S. 657, 663 (1980); *see also United States v. Coleman*, 390 U.S. 599, 601 (1968) (same). Certiorari has been granted, for example, where (as here) statutory interpretation affects local wildlife species and their habitat, *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (Devil's Hole pool and its rare fish inhabitants are protected "objects of historic or scientific interest"), where (as here) the trustee relationship between Congress, the public and our nation's public lands is involved, *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (Congress has the power to protect wildlife on the public lands), or where (as here) the appropriations process raises questions about the applicability of environmental statutes. *Andrus v. Sierra Club*, 442 U.S. 347 (1979) (appropriations are not proposals for legislation requiring EIS revisions). The interests involved in this case merit no less of this Court's attention.

CONCLUSION

The Ninth Circuit's application of § 314 to bar this case conflicts directly with this Court's earlier holdings, which preserve judicial review unless "clearly and convincingly" limited by Congress. The lower court's holding attributes to Congress a broad intent to immunize particular Forest Service activities from the need to consider significant new environmental information, an intent explicitly rejected by the bill's legislative history. The Ninth Circuit completely ignored Congress' twice-stated intention to *preserve* challenges to "any and all particular activities." Indeed, the lower court specifically found § 314 to lack "clarity". Finally, the interests at stake in this case are comparable to others in which the Court has not hesitated to review decisions from the Courts of Appeals. Accordingly, the petition should be granted.

Respectfully submitted,

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May 8, 1990

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON NATURAL RESOURCES COUNCIL, *Plaintiff-Appellant,* v. DAVID MOHLA, in his official capacity as Supervisor, MT. HOOD NATIONAL FOREST, JAMES F. TORRENCE in his official capacity as Regional Forester, Pacific Northwest Region; UNITED STATES FOREST SERVICE, an agency of the United States; and AVISON TIMBER COMPANY, *Defendants-Appellees.*	No. 89-35350 D.C. No. 88-1377-MA OPINION

Appeal from the United States District Court for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Argued and Submitted
August 17, 1989 – San Francisco, California

Filed February 7, 1990

Before: Alfred T. Goodwin, Chief Judge, Mary M. Schroeder and Harry Pregerson, Circuit Judges.

Opinion by Chief Judge Goodwin

SUMMARY

Statutes

Affirming a judgment of the district court, the court held that § 314 of Pub. L. No. 100-446, 102 § 1825 (1988) bars challenge to a Forest Service timber sale which raises environmental concerns in the context of the individual sale.

In 1977, the Forest Service completed a ten-year Timber Management Plan and an accompanying Environmental Impact Study for the Mt. Hood National Forest. In 1979, the Forest Service sold the timber called the Badger Resell, which lies entirely within the Mt. Hood National Forest, but the contract was in default and the land returned. After the Forest Service prepared a supplement to the 1977 Badger Resell Environmental Analysis Report, concluding that a timber resale would not significantly affect the quality of the environment, the Forest Service in 1988 published a decision notice to reoffer Badger Resell and awarded the timber contract to Avison Timber Company. Appellant Oregon Natural Resources Council filed a complaint against the Forest Service and Avison seeking declaratory relief and an order enjoining the logging of Badger Resell. The district court granted summary judgment to the Forest Service, holding that ONRC's challenge to the logging of Badger Resell constituted an impermissible challenge to decisions made in the TMP and therefore was barred by section 314. ONRC appealed.

[1] Section 314 bars a court challenge only on the sole basis that the plan in its entirety is outdated. On its face, this is not such a challenge. In its administrative appeal, ONRC challenged the site-specific Badger Resell EA on

the ground that the EA failed to address new information regarding old-growth forests. Even though couched in site-specific terms, the suit, if successful, would enable ONRC to challenge, sale by sale, the entire Mt. Hood National Forest Timber Management Plan. Such challenges would amount to an attack on the entire plan as outdated. While the statute suffers from some want of clarity, it is plain that Congress did not intend such litigation.

COUNSEL

Victor M. Sher, Todd D. True, Corrie J. Yackulic, Sierra Club Legal Defense Fund, Seattle, Washington, for the plaintiff-appellant Oregon Natural Resources Council.

Donald A. Carr, Acting Assistant Attorney General, Charles H. Turner, United States Attorney, Thomas C. Lee, Assistant United States Attorney, Portland, Oregon; Robert L. Klarquist, Attorney, Department of Justice, Martin W. Matzen, Attorney, Department of Justice, Washington D.C.; Val J. McLam Black, Attorney, Office of General Counsel, United State Department of Agriculture, John B. Munson, Attorney, Office of General Counsel, United States Department of Agriculture, Portland, Oregon, for the defendants-appellees David Mohla, James Torrence, and the United States Forest Service.

William F. Lenihan, Schwabe, Williamson, Wyatt, & Lenihan, Seattle, Washington, Ridgway K. Foley, Jr., P.C., Elizabeth Duncan Ryan, Schwabe, Williamson & Wyatt, Portland, Oregon, for the defendant-appellee Avison Timber Company.

OPINION

GOODWIN, Chief Judge:

This case requires us to resolve an issue we explicitly left open in *Portland Audubon Society v. Lujan*, 884 F.2d 1233 (9th Cir. 1989): whether section 314 of Pub. L. No. 100-446, 102 Stat. 1825 (1988) bars a challenge to a Forest Service timber sale which raises environmental concerns in the context of the individual sale.

Alleging a violation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-70 (1982), Oregon Natural Resources Council (ONRC) challenges the United States Forest Service's decision to sell 240 acres of primarily old-growth forest in the Mt. Hood National Forest in Oregon. The district court held that ONRC's challenge was jurisdictionally barred by section 314, which prohibits challenges to Forest Service plans on the sole basis that the plans in their entirety are outdated.

The planning history leading to the Forest Service's decision to auction the Badger Creek Resell[1] is important to an understanding of the nature of ONRC's challenge to this timber sale. In early 1975, the Forest Service completed a Land Use Plan (LUP) and an accompanying Environmental Impact Statement (EIS) for the Salmon River Unit and Roaring River Unit, where the Badger Resell is located. The LUP operates as a broad planning guide to direct specific resource management, including

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[1] The Badger Creek sale was "repossessed" in 1986 by the Forest Service when economic conditions made the original sale improvident. The sale is referred to as the "Resell" in this opinion.

timber, within the areas covered by the plan. The general management policy for the Roaring River General Forest Unit is that "[t]imber will be managed to maintain a variety of successional types, high water quality and high timber productivity." The accompanying EIS evaluated the environmental effects of this policy, and concluded that timber harvest would adversely affect the habitat for those amphibians, mammals, and birds which require old-growth forests. Environmental concerns were thus recognized and placed in tension with productivity concerns.

In 1977, the Forest Service completed a ten-year Timber Management Plan (TMP) and an accompanying EIS for the Mt. Hood National Forest. The Badger Resell lies entirely within that forest. The EIS accepted the land use allocation for high timber productivity made in the TMP, and considered the environmental impact of various timber management alternatives, from lowering the then-current level of timber harvest to increasing timber harvest. The TMP adopted a plan calling for intensive timber management, which the EIS concluded would cause adverse environmental effects through the loss of old-growth habitat. The plan was nonetheless adopted, and the decision to convert the old-growth forest to second-growth managed "tree farms" became final.

On August 2, 1977, the Forest Service prepared a site-specific Environmental Analysis Report (EA) for the Badger Resell. The EA was "tiered" to the LUP and its accompanying EIS, which means that the EA accepted the land use allocations made in the LUP. *See* 40 C.F.R.

§ 1502.20 (1988). The EA evaluated only site-specific concerns, including the environmental impact of the proposed timber sale.

On September 24, 1979, the Forest Service sold the timber now called the Badger Resell to the Publishers Paper Company. No environmental litigation by ONRC challenged that sale. The contract was in default and was returned to the Forest Service in early 1986, under the provisions of the federal Timber Contract Payment Modification Act, 16 U.S.C. § 618 (1985).

The Forest Service prepared a supplement to the 1977 Badger Resell EA, and concluded that a timber resale would not significantly affect the quality of the environment, making the preparation of an EIS for the sale unnecessary. Based on this finding, the Forest Service approved the resale, and in March, 1988, published a Decision Notice to reoffer Badger Resell. ONRC administratively appealed the resale. The Forest Service denied the appeal. Following the denial of ONRC's administrative appeal, the Forest Service auctioned the Badger Resell and awarded the timber contract to Avison Timber Company (Avison).

ONRC filed a complaint in district court against the Forest Service and Avison, seeking declaratory relief and an order enjoining the logging of Badger Resell. The district court granted summary judgment to the Forest Service, holding that ONRC's challenge to the logging of Badger Resell constituted an impermissible challenge to decisions made in the TMP, and was therefore barred by section 314. A temporary restraining order delayed the

actual logging of the sale until midsummer in 1989, and part of the timber was removed after the TRO was lifted.[2]

I. Is ONRC's Challenge Barred by Section 314?

Section 314 bars challenges to a Forest Service plan "on the sole basis that the plan in its entirety is outdated." It permits challenges to "any and all particular activities to be carried out under existing plans." ONRC appeals the district court's finding on summary judgment that ONRC challenges the logging of Badger Resell solely on the basis that the TMP in its entirety is outdated. ONRC argues that its challenge comes within the savings clause for particular activities.

There is a strong presumption in favor of judicial review of administrative actions. *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1932 (1989). We narrowly construe prohibitions against judicial review. *Id.*

ONRC's NEPA claim is not phrased as a challenge to the existing Forest Service TMP. Instead, as the district court noted, ONRC phrases its claim as a challenge to the procedures the Forest Service used in reoffering the Badger Resell for timber harvest. ONRC contends that the EA, first published in 1977, is outdated, and the Forest Service's decision not to revise the EA or prepare a supplemental EIS in light of significant new findings concerning the relationship between flora and fauna and the

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[2] The case is not moot because logging was not completed during the 1989 summer season.

human environment in old-growth forests violated NEPA.

The district court broadly construed section 314, as prohibiting judicial challenge to an individual timber sale where the challenge does not involve information specific to that timber sale. As the court noted, the Forest Service's decision to log old growth was made more than ten years ago in the TMP and its accompanying EIS. Because ONRC's contention that the Forest Service failed to consider significant new findings concerning the value of old-growth forests is the type of generic issue which brings into question decisions made in the Forest Service TMP, the district court found that ONRC's challenge was jurisdictionally barred by section 314. The court observed that, if it allowed ONRC's challenge, the practical effect would be that ONRC or similarly motivated plaintiffs would be able to stop any Forest Service timber sale which offers old-growth forests for logging in accordance with current Forest Service plans.

[1] This case requires us to grapple with section 314's extraordinary language once again. *See Portland Audubon Society v. Lujan*, 884 F.2d 1233 (9th Cir. 1989). Section 314 bars a court challenge only "on the sole basis that the plan in its entirety is outdated." On its face, this is not such a challenge. In its administrative appeal, ONRC challenged the site-specific Badger Resell EA on the ground that the EA failed to address new information regarding old-growth forests. While ONRC's challenge to the adequacy of this EA is couched in site-specific terms, the suit, if successful, would enable the plaintiffs to challenge, sale by sale, the entire Mt. Hood National Forest Timber Management Plan on the ground that the EAs

failed to take into account new information. Such challenges would amount to an attack on the entire plan as outdated because it failed to take into account recent ecological studies of the value of old-growth forests. While the statute suffers from some want of clarity which is not substantially cured by legislative history, it is plain that Congress did not intend such litigation.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OREGON NATURAL RESOURCES COUNCIL, Plaintiff, vs. DAVID MOHLA, in his official capacity as Supervisor, Mt. Hood National Forest; JAMES TORRENCE, in his official capacity as Regional Forester, Pacific Northwest Region; UNITED STATES FOREST SERVICE, an agency of the United States; and AVISON TIMBER COMPANY, Defendants.	Civil No. 88-1377-MA OPINION (Filed May 25, 1989)

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MARSH, Judge.

This case, brought by the Oregon Natural Resources council (ONRC) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*, challenges the procedures of the Forest Service in presenting an area of forest land consisting primarily of old growth timber for harvest. The Forest Service moves for summary judgment on the basis, *inter alia*, that this court lacks subject matter jurisdiction. Defendant Avison, the contract purchaser of the timber, joins in support of the Forest Service motion. ONRC also moves for summary judgment seeking preliminary or permanent injunctive relief. For the reasons set forth below, the Defendant Forest Service's motion is granted.

Background

The Badger Resell Timber Sale is located on the Estacada Ranger District in the Mount Hood National Forest in Oregon. The sale is 240 acres and the volume of timber in the sale is 14.0 million board feet. The Badger sale is a resale of timber previously sold by the Forest Service to Publishers Paper Company on September 6, 1979. The sale was initially designated as the Three Lynx Sale and the planning for this sale began in 1973. The sale was returned to the Forest Service in March 1986, under the provisions of the Federal Timber Contract Payment Modification Act of 1984, 16 U.S.C. § 618, and reoffered as the Badger Resell in 1988.

The planning history that lead to the sale and resale of Badger is an important factor in the resolution of this case. The Forest Service completed an Environmental Impact Statement (EIS) for the Roaring River and Salmon River Unit Land Use Plan (Land Use Plan) on February 18, 1975. Ex. 102. The Land Use Plan "allocates land use and gives management direction within the specific planning units." *Id.* at i. The Badger Timber Sale lies entirely within the Roaring River General Forest Unit of the plan. Ex. 118 at 1. The management policy for the General Forest Unit provides:

> Timber will be managed to maintain a variety of successional types, high water quality and high timber productivity. A variety of silvicultural methods will be used to reach these objectives.

Ex. 102 at 19.

The Land Use Plan operates as a broad planning guide to direct specific resource management such as that

related to timber. The Mount Hood National Forest Service completed an EIS for its Timber Management Plan on October 26, 1977. Ex. 107. The Timber Management Plan EIS accepts the land use allocations of the Land Use Plan and focuses on the intensity and type of timber management of those lands which have been classified as commercial forest land available for timber production. Ex. 108 at i. The preferred alternative increases the planned level of intensive forest management practices.

> The preferred alternative has been selected because it provides for high production levels of timber products coming from lands allocated for that purpose. It also meets existing policies and regulations. This alternative will have certain resource trade-offs as described later, but they are in general, not significantly greater than other alternatives examined and may be mitigated to a certain extent. This alternative provides a reasonable economic return on investment and is near the level of recent funding for the Forest. The Forest has selected intensive management practices which are technically and practically feasible to enhance timber management and production. By doing so, the Forest will maintain harvest levels near the historic harvest level . . .
>
> The Timber Management Plan is centered around the commercial forest land which is the basis for harvest level calculations. Commercial forest land is productive forest land which has not been reserved or deferred.

Id. at 36.

The Forest Service completed an Environmental Assessment (EA) for the original Badger Timber Sale on August 2, 1977 which tiered to the Land Management

Plan EIS. Ex. 102[1] When the sale subsequently returned the EA was reviewed the reapproved. The Decision Notice to sell Badger Resell was approved on March 16, 1988.[2] The sale was advertised on October 27, 1988 and awarded to Avison Lumber Company on November 29, 1988.

Discussion

The ONRC contends that the Forest Service's decision to sell Badger Resell violates NEPA because the agency failed to consider significant new information regarding old-growth forest ecosystems.[3] The EA for Badger Resell was published twelve years ago on August 2, 1977. ONRC contends that the EA is outdated and the Forest Service has a continuing duty to evaluate and incorporate significant new information. ONRC notes that the significant new information was not known at the time the Forest Service completed the Land Use Plan and the Timber Management Plan EISs and the original EA.

ONRC relies upon a declaration of William Ferrell, a forester and forest ecologist, who has a Ph.D. in Forest

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[1] The Forest Service completed the Draft EIS for the Timber Management Plan on August 5, 1976. The Final EIS was not completed until after the original EA.

[2] The Badger Resell EA tiered to the Land Management Plan EIS as well as the Timber Management Plan Final EIS.

[3] The Forest Service admits that the Badger Resell "consists primarily of decadent old growth Douglas-fir and western hemlock-true firs." Defendant's Exhibit 118 at 2.

Soils and Tree Physiology. Dr. Ferrell states that old-growth forests are highly specialized, unique ecosystems and not merely older second growth forests. Declaration of William Ferrell at 6. He asserts that there are major contrasts between old-growth and managed, young-growth stands in structure, species, and patterns of material and energy flows. *Id.* Dr. Ferrell notes that in the seminal work on old-growth forest ecosystems, Dr. Franklin states: "Old growth forests provide highly specialized habitats and are neither decadent, unproductive ecosystems nor biological deserts." Franklin, J.F., et. al., 1981, *Ecological Characteristics of Old-Growth Douglas-fir Forests*, USDA, PNW-118. *Id.* at 2. Dr. Ferrell concludes in his review of the Badger Resell environmental documents that the Forest Service did not consider the unique features of old-growth forests in deciding whether to reoffer the Badger Resell sale. *Id.* at 6.

A federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions after the release of an EIS. *Marsh v. Oregon Natural Resources Council*, ___ U.S. ___, No. 87-1704, Slip Op. (May 1, 1989). The Forest Service typically tiers its' individual timber sale EAs to a resource management plan EIS. The EAs must discuss new circumstances or information "relevant to environmental concerns and bearing on the proposed action or its impact." 40 C.F.R. § 1502.9(c)(1)(ii).

Generally I would examine the evidence before me to determine if there were genuine issues of fact concerning the Forest Service actions in carrying out its continuing

duty to consider new information. Such duty would normally be subject to my review. However, in certain circumstances this court's jurisdiction has been statutorily withdrawn.

Section 314 of the 1988 continuing budget resolution provides:

> The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. § 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: Provided, however, That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: Provided further, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

Continuing Resolution, H.J. Res. 395, § 314, Pub. L. No. 100-202, 101 Stat. 1329-254, 133 Cong. Rec. H 12468 (daily ed. Dec. 21, 1987). (This section was reenacted without change as H.R. 4867 and signed by the President on September 27, 1988, and is now found in Pub. L. No. 100-446).

The Forest Service contends that Section 314 bars this litigation as a challenge to the Land Use Plan and Timber Management Plan of the Mount Hood National Forest. The Forest Service argues that the goal of plaintiff's lawsuit is to prevent the Forest Service from managing timber resources under the existing Timber Management Plan because the existing Timber Management Plan does not incorporate information relating to old growth ecosystems made available subsequent to the adoption of the plan. ONRC contends Section 314 does not apply because its claims relate to a particular sale and not the underlying management plans.

It is well settled that in interpreting a statute the court must consider each provision in context with the statute as a whole. *BV Engineering v. Univ. of Ca., Los Angeles*, 858 F.2d 1394, 1398 (9th Cir. 1988). I must give meaning to Section 314 as a whole and avoid rendering any part of the statute inoperative or insignificant. *See Rockbridge v. Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971) *citing Richards v. United States*, 369 U.S. 1 (1962).

The first part of Section 314 describes the Forest Service's affirmative and continuing duty to prepare and complete new forest plans in accordance with the National Forest Management Act, 16 U.S.C. § 1600. It also allows the Forest Service to continue to manage the national forests under the current resource management plans until the new plans are completed. Thus the statute indicates that there is an area where the Forest Service may continue to manage resources with the current plans, even when these plans are outdated. This is supported by the language in Section 314 which precludes judicial review when the sole issue relates to new information

which could contradict a current plan or render it outdated. At the same time, it is clear that judicial review is not precluded when a particular activity that is site specific is challenged. Between these two obvious mandates of the statute lies an area of uncertainty which results from what the Ninth Circuit Court of Appeals referred to as the "extraordinary language" of the statute. *Portland Audubon Society v. Hodel*, 866 F.2d 302, 304 (9th Cir. 1989).

In *Portland Audubon* the court of appeals was faced with an argument similar to that made in this case. The difference lies in the particular language relating to the Bureau of Land Management, i.e. "that there shall be no challenge . . . solely on the basis that the plan does not incorporate information subsequent to the completion of the existing plan", and the critical language relating to either the Forest Service alone or to both the Forest Service and the Bureau of Land Management, i.e. "that there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated".

In this case, as was the case in *Portland Audubon*, the plaintiff contends that the challenge is to a particular activity, that is, the particular sale. On the other hand, the Forest Service contends that to designate an individual sale as a particular activity is to avoid the prohibition against the underlying plan.

As the court stated in *Portland Audubon*:

> The sales are indeed separate transactions. They are also part of an existing plan of disposal of federal timber in the region. Thereby hangs the problem in this case.

Portland Audubon Society, 866 F.2d at 305. The Court then focused on the term "solely" to determine what the statute prohibited irrespective of what the parties agreed was the legislative sponsor's intent. In reversing the trial court, the Ninth Circuit found several bases for the challenge and ultimately remanded the case requiring the "district court to decide how to apply the law to particular sales." *Id.* at 307.

Upon re-examination of these questions on consideration of summary judgment the District Court found an overall challenge to the plan rather than site specific particular activity in each sale. *See Portland Audubon Society v. Hodel*, No. 87-1160-FR, slip op. at 72 (D. Or. May 18, 1989).

The language in the *Portland Audubon* opinions is instructive in that it highlights the difficulty in statutory construction in this case. The courts attention can easily be distracted by the two separate references to "particular activity" and lose sight of the concern for a challenge to an existing plan "on the sole basis" that it is outdated. As stated above, a particular activity which gives rise to a challenge which relates solely to the plan is not subject to judicial review. However, a particular activity which gives rise to a challenge which is site specific is subject to judicial review. Therefore the categorization of an agency action as a particular activity, such as a single timber sale, is not determinative of whether or not it is subject to judicial review. Rather the inquiry must be whether the new information which is the subject of the challenge relates solely to the plan or whether the information relates to a site specific activity.

In this case, ONRC challenges the decision of the Forest Service not to issue an EIS or alternatively that the supplemental EA on the Badger Timber Sale was inadequate. ONRC's challenge is to a single timber sale. However, this does not end the inquiry. I must determine whether the challenge to this timber sale is solely based of [sic] new information which makes the current underlying plan outdated or whether the challenge is based on new information which is site specific in nature.

ONRC characterizes this action as an action brought "on the sole basis of new information concerning old growth forests." Tr. at 39. While there are allegations in ONRC's first amended complaint and in the briefing about the spotted owl, ONRC states that this section concerns the Forest Service's failure to consider new information about old growth. *Id.*[4] ONRC states that the

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[4] [THE COURT] What I read in your memoranda, your exhibits, is it's the plaintiff's position that there is entirely new scientific view of old growth. Now, again I want to try and point this particular case that's before me, its relationship to the other cases we'll get to. But let's just stay right on this case. There are allegations in your first amended complaint and there are discussions in all your briefs about the spotted owl. Is the spotted owl an issue upon which the plaintiff is contending in this case?

MS. YACKULIC: It's an example of one of the species that's dependent on old growth. But our concern is that the Forest Service has to consider the old-growth information.

(Continued on following page)

Forest Service decided to log the Badger Resell because the old growth timber is decadent and should be replaced with a thrifty new stand of trees. Ex. 118 at 13. ONRC further contends that in failing to consider the new information presented by Dr. Ferrell concerning old growth forest ecosystems in its' decision to harvest this area, the Forest Service violated the requirements of NEPA. Tr. at 39-40.

The Forest Service made the timber management decision to convert old growth forests into even aged stands in the Timber Management Plan. Ex. 108. The summary of the EA follows from the prior planning decisions in the Timber Management Plan. The Forest Service characterizes the timber in the sale area as primarily decadent old growth Douglas fir and Western Hemlock-true firs. Ex. 118 at 2. The EA states:

> The majority of the stand is presently at the point where it is stagnated and defect is increasing, hence, a slow loss in net volume. Removing this decadent old growth and converting to intensive management will more effectively utilized nutrients and growing space for a new tree crop.

Id. at 13. It is recognized that "under intensive management the stand will never return to its present old growth status." *Id.* at 16. Therefore, the Badger Resell EA reflects

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(Continued from previous page)

THE COURT: All right. Is your attack here on the consideration of old growth, period?

MS. YACKULIC: Yes.

Tr. at 39.

the timber management decisions made in the Timber Management Plan EIS.

Dr. Ferrell's states that the new information concerning old growth "is essential to choosing between alternative land management uses of the Badger Resell area." Declaration of William Ferrell at 3. Thus, ONRC's own expert confirms that it is challenging the larger management decision and not site specific information.

ONRC's complaint contains the precise type of challenge that Congress intended to limit in Section 314. Section 314 would be meaningless if ONRC was allowed to challenge individual timber sales on the basis of past management decisions made in the current plan. I find that Congress intended to prohibit judicial review of challenges to particular timber sales when the basis of that challenge is that the Forest Service did not consider new information which relates solely to the plan. If I allowed ONRC to challenge this sale on the basis of new information concerning old growth then I would in effect be allowing ONRC to challenge the decisions made in the Timber Management Plan. The practical effect would be that ONRC could challenge any Forest Service timber sale EA which prescribed for logging the old growth in accordance with the current plans. I find that this challenge is actually an attack on the Timber Management Plan on the basis that the plan is outdated. Therefore the challenge is precluded from judicial review.

Accordingly, I conclude that Section 314 operates to preclude ONRC's action. The Defendant Forest Service's motion for summary judgment [#22] is granted on the basis that this court lacks subject matter jurisdiction.

DATED this 25 day of May, 1989.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL RESOURCES COUNCIL, Plaintiff, vs. DAVID MOHLA, in his official capacity as Supervisor, Mt. Hood National Forest; JAMES TORRENCE, in his official capacity as Regional Forester, Pacific Northwest Region; UNITED STATES FOREST SERVICE, an agency of the United States; and AVISON TIMBER COMPANY, Defendants.	Civil No 88-1377-MA ORDER GRANTING MOTION FOR SUMMARY JUDGMENT (Filed May 25, 1989)

I conclude that Section 314 operates to preclude ONRC's action. The Defendant Forest Service's motion for summary judgment [#22] is granted on the basis that this court lacks subject matter jurisdiction.

IT IS SO ORDERED.

DATED this 25 day of May, 1989.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

APPENDIX D

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Hon. Malcolm F. Marsh

Filed
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL RESOURCES COUNCIL, a non-profit corporation, Plaintiff, v. DAVID MOHLA, in his official capacity as Supervisor, Mt. Hood National Forest; JAMES TORRENCE, in his official capacity as Regional Forester, Pacific Northwest Region; UNITED STATES FOREST SERVICE, an agency of the United States, and AVISON TIMBER COMPANY, an Oregon corporation, Defendants.	Civ. Action No. 88-1377MA FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. PRELIMINARY STATEMENT

1. This is an action for a declaratory judgment and injunctive relief. Plaintiff challenges the decisions of defendants David Mohla, Jim Torrence, and the United States Forest Service (collectively, the "Forest Service") to allow the logging of 240 acres of old-growth forest called the Badger Resell on the Mt. Hood National Forest without adequately considering the sale's environmental effects.

2. The action arises under and alleges violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 501 *et seq.*

3. Plaintiff seeks an order directing the Forest Service to prepare an adequate environmental impact statement for the Badger Resell sale. Plaintiff also seeks an injunction against logging the Badger Resell sale until the Forest Service meets the requirements of NEPA. Such relief is necessary to preserve the status quo, to prevent illegal agency action, and to forestall irreparable injury to the environment and plaintiff's interests.

II. JURISDICTION AND VENUE

4. Jurisdiction over this action is conferred by 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief); and the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*

5. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) and Local Rule 105-2, D. Ore., as plaintiff's claims arise in Oregon.

III. PARTIES

6. Plaintiff Oregon Natural Resources Council ("ONRC") is a registered Oregon non-profit corporation dedicated to protecting and conserving Oregon's wildlife, lands, waters and natural resources. ONRC's principal place of business is at 522 S.W. 5th Ave., #1050, Portland, Oregon 97204. ONRC's members use the Roaring River area, including the area proposed for logging by the Badger Resell sale, for recreational activities, including hiking, photography, bird watching, and backpacking. Their use and enjoyment of the Roaring River area and their interest in the protection and maintenance of a healthy and diverse old-growth ecosystem will be irreparably damaged by the sale and logging of the Badger Resell timber sale.

7. Defendant David Mohla is Forest Supervisor of the Mt. Hood National Forest and the official who approved the Badger Resell timber sale. He is sued here in his official capacity. Defendant James Torrence is Regional Forester of the Pacific Northwest Region of the United States Forest Service and is the official who denied plaintiff ONRC's administrative appeal of Mr. Mohla's decision to sell the Badger Resell timber sale. Mr. Torrence also is sued here in his official capacity. Defendant United States Forest Service is an agency of the United States. Defendants Mohla, Torrence, and United States Forest Service will be referred to collectively as the "Forest Service."

8. Defendant Avison Timber Company ("Avison") is an Oregon corporation and is the company awarded the contract for the logging of Badger Resell.

IV. STATEMENT OF FACTS

A. The Environment

9. The Badger Resell sale is located on Roaring River Flat, part of the Estacada Ranger District on the Mt. Hood National Forest. The sale is generally in Sections 2, 3, 4, 9, 10, and 11, T. 5 S., R. 6 E., Willamette Meridian. Roaring River Flat is a several-thousand-acre unlogged bench above the Clackamas River and adjacent to the Roaring River Special Interest Area, an area acclaimed for its spectacular river gorge and unscarred river valley with timber sweeping up the steep slopes. The Flat gently slopes from east to west and from about 4,000 feet elevation on the east side to about 3,200 feet on the west. The forests of the Flat include the mountain hemlock zone on the higher elevation east end, the Pacific silver fir zone in the body of the Flat with a small amount of the western hemlock zone in the lowest elevations. The Flat is notable for being among the last large unfragmented forests left on the Clackamas Ranger District.

10. Badger Resell proposes to log, by patch clearcutting (of 12 units) and shelterwood logging (of one unit), 13 units totalling 240 acres of the Flat's forest. The acres to be logged are primarily "old-growth forest" with trees averaging several feet in diameter. Old-growth forests are diverse and unique ecosystems. They provide rich and important wildlife habitat, a source of nutrients for streams, and magnificent settings for recreational pursuits of all kinds. Old-growth forest ecosystems take at least two hundred years to develop. Once cut, they are irretrievably lost for our generation, our children's generation, and their children's generation. The spectacular,

"cathedral"-like beauty of the forest will be forever lost, replaced by a managed tree farm plantation.

11. Old-growth forests, such as those to be logged by Badger Resell, are habitat for several wildlife species which depend upon such forests for their survival. The northern spotted owl is the most studied of these species. The entire scientific community agrees that further old-growth forest logging threatens the spotted owl with extinction. No assessment of the cumulative effects of timber sales, including the Badger Resell timber sale, on the spotted owl has been made by the U.S. Forest Service.

B. Administrative History

12. On August 2, 1977, the Forest Service approved an Environmental Assessment Report ("1977 EAR") for the Badger timber sale (at that time called "Three Lynx"). Exhibit A, attached hereto. The sale was sold, roads were constructed, but the timber was never logged. Rather, it was returned to the Forest Service pursuant to the Federal Timber Contract Payment Modification Act, 16 U.S.C. § 618. The timber rights thus reverted back to the Forest Service.

13. On March 16, 1988, the Forest Service published a notice of decision of its intent to sell the Badger Resell timber sale ("1988 NOD"). Exhibit B, attached hereto. Minor changes were made to the original Badger sale by adjusting some clearcut boundaries.

14. The 1988 NOD concludes that the Badger Resell "will not significantly affect the quality of the human

environment. Therefore, an environmental impact statement is not needed." Exhibit B at 1, attached hereto.

15. On April 11, 1988, plaintiff Oregon Natural Resources Council filed with the Forest Service a notice of administrative appeal of the decision to sell the Badger Resell Sale pursuant to 36 C.F.R. § 211.17. Exhibit C, attached hereto.

16. On July 21, 1988, the Forest Service denied ONRC's administrative appeal. Exhibit D, attached hereto. In rejecting ONRC's appeal, the Forest Service claimed that "old-growth values were addressed in the EIS for the Roaring River Unit." In fact, that EIS, prepared in 1974 ("1974 EIS"), fails entirely to reveal the unique ecology of old-growth forests, the diminishment of these forests across the Pacific Northwest, or the cumulative effects of that loss on dependent wildlife species and the forest ecosystem. In addition, neither the 1974 EIS, 1977 EAR, nor 1988 NOD assess the cumulative effects old-growth logging has on the northern spotted owl's survival.

17. On November 23, 1988, ONRC notified the Forest Service of its intent to bring this litigation. ONRC further requested that the Forest Service notify prospective purchasers if the Forest Service proceeded with bidding of Badger Resell on November 29, 1988. Exhibit F, attached hereto.

18. The Forest Service bid the sale on November 29, 1988.

19. The Forest Service awarded the sale to Avison on November 30, 1988. On December 5, 1988, Richard A. Stahl of this office called the Forest Service to find out

when the Forest Service planned to award Badger Resell. Ms. Judy Peterson of the Forest Service stated Badger Resell had been awarded the day following bidding, November 30, 1988. It is very unusual for the Forest Service to award a timber sale the day after bidding. Second Declaration of Richard A. Stahl.

C. Summary

20. In the absence of an injunction, logging of the Badger Resell timber sale will occur. This logging will damage the scenic beauty of Roaring River Flats, destroy irreplaceable old-growth forests, and cumulatively threaten the survival of northern spotted owl.

IV. CLAIM FOR RELIEF

21. The Forest Service's sale of Badger Resell constitutes a major federal action with significant effects upon the quality of the human environment under NEPA, 42 U.S.C. § 4332(2)(C). The defendants' sale of Badger Resell causes direct, cumulative, synergistic, and indirect environmental effects that have not been examined in an EIS.

22. The Forest Service's failure to examine in an EIS the direct, cumulative, synergistic, and indirect environmental effects of the Badger Resell timber sale violates NEPA, 42 U.S.C. § 4332 *et seq.*, 40 C.F.R. § 1508.27(b)(7) (failure to consider cumulative effects) and is subject to judicial review under 5 U.S.C. §§ 702, 706(2).

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that the Court:

1. Determine and declare that the Forest Service may not sell Badger Resell without conducting an adequate environmental review.

2. Determine and declare that the Forest Service's actions as set forth above are not in compliance with procedures required by law, contrary to 5 U.S.C. § 706(2)(D).

3. Enjoin the Forest Service from permitting logging on Badger Resell, unless and until a proper environmental review has been conducted.

4. Enjoin Avison Timber Company from logging Badger Resell, unless and until the Forest Service has met its obligations under NEPA.

5. Award plaintiff its reasonable fees, costs, expenses, and disbursements associated with this litigation.

6. Grant plaintiff such additional and further relief as the Court may deem just and proper.

DATED: December 5, 1988.

Respectfully submitted,

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APPENDIX E

EXCERPTS FROM:

TIMBER MANAGEMENT PLAN
MT. HOOD NATIONAL FOREST
REGION SIX

EASTSIDE AND WESTSIDE WORKING CIRCLES

Plan Period October 1, 1977 to Sept. 30, 1987

TIMBER MANAGEMENT PLAN

MT. HOOD NATIONAL FOREST

REGION SIX

Effective Date – FY 1978

Prepared by /s/ Ronald R. Humphrey, Forester — 2/13/78 (Date)

/s/ Illegible, Timber Staff — 2/13/78

Recommended by /s/ F. Dale Robertson, Forest Supervisor — Feb. 13, 1978

Approved by /s/ R.E. Worthington, Regional Forester — 2-22-78

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INTRODUCTION

This plan will cover the period October, 1, 1977 through September 30, 1987 and will replace the plan approved January 14, 1963. It is based on a field timber inventory completed in 1971. It is further based on land use policies and decisions available at the time of plan development. Other resources were considered using the most current resource inventories and management direction available. A reference to the documentation of these policies and management direction is found in the Appendix.

This Timber Management Plan document is not a complete presentation of the timber management planning process in itself. It is written to be a "working document"

for the professional timber resource manager at the Forest and Ranger District level. As such, it presents, in as brief and summarized form as possible, the background information, management objectives and directions, and the statistical standards (i.e. controls) which are necessary to guide the timber manager in his day-to-day job of translating the Ten Year Timber Management Plan into on-the-ground actions programs in concert with the Mt. Hood National Forest Land Management Plans. For a more comprehensive and detailed understanding of the long range timber management planning process and its relationships to other Forest Land Management and resource management concerns, two other separately bound documents also should be consulted. The first of these documents is the *Final Environmental Statement – Timber Management Plan* for the Mt. Hood National Forest. Multiple use coordinating guides are found in this document. The second separately bound document is entitled *Forest Inventory Statistics – Mt. Hood National Forest,* approved February 1, 1976. Also, completed Land Management Plans and District Multiple Use Plans provide much of the direction upon which this plan is based.

These three documents, together, provide a comprehensive and detailed record of the timber management planning process and allowable harvest calculations. An official case file which contains these three documents is maintained at each Ranger District Headquarters, the Forest Supervisor's Office and the Regional Office. In addition, files are maintained at the Supervisor's Office and the Regional Office, Division of Timber Management, which contain "working papers" consisting principally of

computer outputs which were produced during the planning process.

This plan will be responsive to changes in land use designations and/or timber management planning techniques. A target date of October 1, 1982 (five years into the total year plan period) is established for a formal review of the plan to see if revision is warranted.

This plan develops a biological potential yield based on the capabilities of the site. It then recognizes and quantifies impacts due to the management of other key resources, accounts for these impacts and thus, develops potential yields. Annual Programmed Harvest (i.e. the proportion of the potential yield which will be actually sold year-by-year) will be set annually at levels consistent with experienced current management intensity and available funding.

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BLOCK ALLOCATION OF ANNUAL SELL TO RANGER DISTRICTS

Volume allocations will be controlled on a working circle basis. Initial annual sell allocations are as follows and are based on various factors as explained below.

The initial allocation of districts was made by determining the percentage of the total biological potential each district represented by running the RAM model with and without each individual district's plots. Each district's share of the total forest model was reconstructed from the plot map. After this step was completed (column 1 and 2), appropriate reductions were made on a prorata basis to

each district's biological potential based on in-place data acreages.

These several reductions resulted in the indicated totals shown in column 10. These indicated totals were adjusted in consultation with district TMAs because of their inherent knowledge of ground conditions and to specific locations of timber types and sites. This supplemental knowledge was used in order to: (1) provide for more orderly transition from present to planned district harvest levels and (2) to speed up the conversion of decadent stand on the Bear Springs District. The tentative allocation shown in the tentative block allocations table reflects this adjustment and fluctuations in the salvage program from year to year. These allocations are subject to frequent adjustment as additional site specific information becomes available and as further resource and economic study is completed and decisions are reached.

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APPENDIX A

DEFINITION OF TERMS

Allowable Harvest. (See Programmed Allowable Harvest)

Biological Potential. The maximum productivity obtainable under a specified management intensity level on all productive forest land other than in Reserved and Deferred, without a reduction for the constraints of key resources other than timber.

Commercial Forest Land. Forest land that is suitable for growing continuous crops of timber and has the ability to

produce at least 20 cubic feet per acre per year of commercially usable wood. Does not include productive forest land withdrawn from timber use.

Component. A portion of the commercial forest land base which has management direction apart from other portions.

Control. The process of monitoring performance under a Timber Management Plan for purposes of determining if plan objectives are being met.

Conversion Period. A period of time, starting with the present and ending when all elements of the Forest have been treated or have had the opportunity to be treated. Usually this means that all acres scheduled for regeneration cutting have been harvest cut at least once.

Cutting Methods.

Regeneration Cutting. A cutting practice consisting of the removal of an existing merchantable stand. On the Mt. Hood National Forest, there are four types of regeneration cuts presently employed. They are:

1. *Clearcut*. The removal of the existing timber stand in one operation and establishment of the new stand by natural or artificial means.

2. *Shelterwood*. The removal of the existing timber stand in two or more operations. Designated trees are left after the first cut(s) to provide seed, shelter and shade for the new crop. Final removal is scheduled when the new crop trees are considered established.

3. *Seed Cut*. The entry in shelterwood cutting whereby stand stocking is reduced to those trees desired for seed and shelter.

4. *Removal Cut*. A cut to remove a portion or all of the over-story after regeneration is secured.

Commercial Thinning. A commercial harvest in a stand under a selected rotation age to reduce stocking to a recommended level with the objectives of increasing growth of the remaining trees as well as increasing the total accumulated production for the entire rotation.

Mortality Salvage. A harvest on the Mt. Hood National Forest designed to remove scattered blowdown and dead trees outside of cutting units planned for regeneration harvest or commercial thinning.

Deferred Forest Land. Commercial forest land that has been administratively identified for study as possible additions to the wilderness system or other withdrawal from timber utilization under authority granted in the Federal Code of Regulations.

Empirical Yield Table. A table showing, for one or more given species on a given site, the progressive development of a stand at periodic intervals covering the greater part of its useful life and is prepared on the basis of actual average stand conditions. In management planning, this is the natural growing stand.

Even Aged Management. The management of forest stands where patches of trees have relatively the same age and the objective of management is to perpetuate this condition.

Evenflow. Maintaining a relatively constant supply of timber from year to year.

Forest Types. A classification of forest land based on the tree species now forming most of the stocking. Where no species comprise a majority of the stand, types are based on plurality of stocking.

Genetically Improved Stock. Planting stock which has either good indication of or proof of superiority over wild stock in one or more characteristics of importance in silviculture. These characteristics may be disease resistance, wood quality or growth potential.

Intermediate Harvest. A general term used to denote any removal of trees in a stand between the time of its formation and the regeneration harvest cutting.

Logging Systems.

Tractor Logging. A system of log transportation in which logs are pulled from the woods to a landing by means of a crawler tractor, skidder or similar ground based equipment.

High Lead Logging. A system of cable logging in which the working lines are elevated at the landing area by a rigged wooden tree or portable steel spar.

Skyline Logging. A system of cable logging in which all or part of the weight of the logs is supported during yarding by a suspended cable.

Balloon Logging. A system of cable logging in which the weight of the logs is counteracted by the lift provided by a lighter-than-air balloon.

Helicopter Logging. A system of transporting logs from the woods to a landing as an external load on a helicopter.

Managed Yield Table. A table showing, for a given species on a given site, the progressive development of a managed stand at periodic intervals covering the greater part

of its useful life. It usually includes average diameter, basal area, number of trees and final yields; and may include volumes of thinnings, depending on the level of management intensity programmed for the stand. In management planning, this is the way the stand is projected to grow under managed conditions.

Marginal Component. The portion of the regulated commercial forest land on which it is presently not feasible (economically or technologically) to manage for timber crops because of soil constraints, difficulties in establishing tree regeneration or excessive development costs.

Mortality. The volume of sound wood in live sawtimber and pole timber dying from natural causes during a specified period.

Mortality Salvage. (See definition under Cutting Methods)

Multiple Use. The practice of forestry which combines two or more objectives such as production of wood or wood-derivative products, forage and browse for domestic livestock, proper environmental conditions for wildlife, landscape effects, protection against floods and erosion, recreation, and production and protection of water supplies.

Noncommercial Forest Land. Forest land of such low site quality that it is generally incapable of producing 20 cubic feet per acre per year of usable wood products.

Nonforest Land. Land that has never supported forests and lands formerly forested but now developed for such nonforest uses as crops, improved pasture and residential areas.

Old Growth. Very old trees usually well past physiological maturity. Local silviculturists generally consider trees over 200 years of age as old growth.

Potential Yield. The maximum sustained harvest possible under a specified management intensity level recognizing reductions for the constraints of key resources other than timber.

Programmed Allowable Harvest. That part of the potential yield that is scheduled for cutting in a specific year. Forest Supervisor decides on the level of cut based on current demand, funding, silvicultural practices and multiple use considerations.

Regulated Timber. Timber harvested from those lands that will be or are organized on a sustained yields basis.

Rotation. The period of years required to establish and grow timber crops to a specific condition of maturity.

Sawtimber. Live trees of a sufficient size that will produce lumber products.

Silviculture. The art of producing and tending a forest.

Site Index. A measure of the relative productive capacity of an area for growing wood. Measurement of site index is based on height of the dominant trees in a stand at a given age.

Special Component. The portion of the regulated commercial forest land that needs specially designed treatment of the timber resource to achieve landscape or other key resource objectives. On the Mt. Hood National Forest, this component includes Retention, Partial Retention and Bull Run Reserve.

Stand. An area of trees that has sufficient uniformity in species, age and density to distinguish it from other stand around it.

Standard Component. The portion of the regulated commercial forest land on which crops of industrial wood can be grown and harvested with adequate protection of the forest resources under the usual provisions of the timber sale contract.

Stocking Level Control. The process of maintaining the desirable number of trees to achieve optimum growth and management. It not only includes thinning (both precommercial and commercial) and interplanting, but other cultural work such as brush and rodent control as well.

Streamside Management Unit. The stream and an adjacent area of varying width where practices that affect water quality and other aquatic resources are modified as necessary to meet the objectives for each class of stream.

Sustained Yield. Management of a forest for continuous production that is an approximate balance between net growth and harvest.

Thinning. The practice of removing some of the trees in a stand so that the remaining trees will grow faster because of reduced competition for nutrients, water and sunlight

Timber RAM. A computerized method for developing long range forest management plans (Timber Resource Allocation Method).

Tolerance. The ability of a tree to grow satisfactorily in the shade of, and in competition with other trees.

Unregulated Land. Commercial forest land that will not be organized for timber production on a sustained yield basis.

Unregulated Timber. Timber cut from those lands not organized for timber production to provide sustained yields.

Working Group. A grouping of similar timber types by site index classes.

APPENDIX F

EXCERPTS FROM:

FOREST SERVICE - USDA
PACIFIC NORTHWEST REGION
FINAL ENVIRONMENTAL STATEMENT

THE MT. HOOD NATIONAL FOREST TEN YEAR TIMBER, MANAGEMENT PLAN

USDA - FS - R6 - FES(Adm) - 76 - 74

PREPARED IN ACCORDANCE WITH
SECTION 102(2)(c) of PUBLIC LAW 91-190
THE NATIONAL ENVIRONMENTAL POLICY
ACT OF 1969

Responsible Official: for National Forest Land

Richard E. Worthington
Regional Forester
Pacific Northwest Region
Box 3623
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SUMMARY SHEET

I. DRAFT ( ) FINAL (X)

II. FOREST SERVICE, USDA

III. ADMINISTRATIVE (X) LEGISLATIVE ( )

IV. BRIEF DESCRIPTION OF THE ACTION

The proposed action is implementation of a revised ten year Timber Management Plan for the Mt. Hood National Forest. The existing Timber Management Plan was approved in January 1963 and there is a need to reflect significant changes that have taken place since then. Classification of the land base and inventory data have

been updated. Utilization of forest products has changed significantly. Research is improving our reforestation techniques and the forest is developing a tree improvement program. We also now have the availability of a linear program, timber RAM (Resources Allocation Method), for computation of harvest levels and schedules.

Land Management Planning is the basis for land allocation on the Mt. Hood National Forest. This environmental statement deals with the intensity and type of timber management on those lands which have been classified as commercial forest land available for timber production by the land management planning process. The preferred alternative will increase the planned level of intensive forest management practices as follows:

Treatment	Present Plan Units/Year		Proposed Action Units/Year	
Regeneration Harvest	282.3	MMBF	336.7	MMBF
Commercial thinning	7.8	MMBF	9.9	MMBF
Mortality salvage	Unest	MMBF	17.5	MMBF
Stocking level control	0	Acres	1,975	Acres
Planting genetic stock	0	Acres	1,691	Acres

Intensive forest management activities will allow each acre treated to more nearly achieve its productive capacity, thus enabling a greater harvest during the plan period. This is consistent with national goals to increase timber supplies through intensive management practices as stated in the Forest and Rangeland Resource Planning Act (RPA) of 1974.

The preferred sell level of 364.1 million board feet, or 66.67 million cubic feet per year is based on a level of management that can be obtained without unacceptable environmental impacts. In the future, more detailed stand examinations and/or increased technology might permit

increased levels of intensive forestry practices which would result in an increased sell level over that which is proposed and still meet environmental guidelines. The preferred sell level is dependent on accomplishment of the proposed intensive management practices. If roads are not constructed to allow the thinning activity required to maintain stocking level control, then the volume will not be available. The proposed action only includes those activities which can be accomplished or programs begun during the plan period. A control program will keep the harvest level consistent with the accomplishment at the proposed intensive practices. The proposed Plan will be responsive to future changes in land allocation and policy. The proposed plan does not program any harvest in the Bull Run Reserve in line with a recent U.S. District Court decision based on the 1904 Trespass Act. Currently, there is legislation pending in Congress which may modify the Reserve boundary and the direction for management in the Reserve.

This plan will be in effect until it is reviewed and if necessary revised as soon as practicable under the guidelines for land management planning. These guidelines will be in the regulations promulgated pursuant to Section 6 of the National Forest Management Act of 1976 (PL 94-588), including the guidelines developed under subsection 6(g) through consultation with the Committee of Scientists.

The Mt. Hood National Forest is located in North Central Oregon and includes portions of Multnomah, Hood River, Wasco, Jefferson, Clackamas and Marion Counties.

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